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### EC94-808 Protecting Intellectual Properties

Alan J. Corr

*University of Nebraska - Lincoln*, [acorr1@unl.edu](mailto:acorr1@unl.edu)

Herbert Hoover

*Nebraska Technical Assistance Center*

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# Protecting Intellectual Properties

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*Alan J. Corr, Alternate Enterprise Specialist  
Center for Rural Community Revitalization and Development  
Institute of Agriculture and Natural Resources*

*Herbert Hoover, Information Specialist  
Nebraska Technical Assistance Center*

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Intellectual property refers to any product of human intellect which has market value. Examples of such properties include inventions, ideas or expressions, business methods, industrial processes, and chemical formulas. Intellectual properties have an economic value which is determined by a particular market and, therefore, may be considered a business asset (intangible property) and a business decision tool.

In order to consider an intellectual property as a valid business asset, it should be protected through legal means such as patents, trademarks, service marks or copyrights, as provided through intellectual property laws.

## Trademark

A trademark is any word or symbol which is consistently attached to goods to identify and distinguish them from others in the marketplace. In other words, a trademark is a brand name. Trademarks are a means of identification for a product of a particular individual or company. The mark can be a symbol, word, design, slogan, or a combination of words and designs. Sometimes trademarks are confused with trade names. Trade names refer to the name of the company which sells the product or service, and trademarks are the name of the product or service that a particular company is selling. Trademarks are protected under federal trademark laws, and trade names are protected under state laws where the company resides.

Customers often purchase a product because they associate a certain quality or reputation to the trademark. Service marks, which are also a form of trademark protection, are a name or symbol that identifies services rather than products provided by a company. Examples of service marks include "Blue Cross Blue Shield," and "Merry Maids." Certification marks are a form of trademark protection, consisting of a name or symbol identifying a particular group, board, or commission which judges the quality of goods or services such as "UL Approved" and "Good Housekeeping." The final form of trademark protection is Collective marks. These consist of an identifying symbol or name showing

membership in an organization such as "FDIC."

Home-based businesses and small agricultural enterprises in Nebraska offer many unique, high-quality products and services that could be trademarked for marketing purposes. Also, copyrights (discussed later) may offer additional opportunities for protecting home-based business works of art.

Trademark rights can last indefinitely; however, five to six years following the initial registrations, the registrant must file an affidavit stating that the mark is currently being used and then must renew the mark every 10 years thereafter. The owner of a trademark must police it against infringement and assure that it does not fall into general use by others. Otherwise, the mark may become generic, and trademark protection is lost.

Obtaining a trademark can be a very time consuming task, especially if one plans to market products nationally. Approval of a federally registered trademark can take several months. Existing trademarks may be registered nationally, providing the product is being sold in interstate commerce (i.e. the mark will be used in two or more states). Also, a trademark can be registered within a state. This is done through the Nebraska Secretary of State Corporate Division Office. The 1994 cost for state registration in Nebraska is \$100, and for federal registration, the fee is \$245. These fees change over time. For the current costs, contact the appropriate registration office.

If the mark will be used only within the state, then it needs only to be registered with the Nebraska Secretary of State. If the mark will be used in two or more states, then it will be eligible for federal registration through the [U.S. Patent and Trademark Office](#).

Before applying for registration, it is very beneficial to know if the trademark or a similar trademark exists. This information is available on an individual state basis from the Secretary of State offices in state government, and on a national basis from the Patent and Trademark Office, U.S. Department of Commerce. There are state agencies that offer assistance by checking for existing trademarks. The [Nebraska Department of Economic Development](#) or the corporate division of the Nebraska Secretary of State provides free searches of state registered marks. The Nebraska Technical Assistance Center at the University of Nebraska-Lincoln provides free preliminary searches of federally registered trademarks to determine whether a proposed mark is currently being used or pending for use. If the search indicates that the mark has not been registered, then a business can apply for registration; however, one should consider having the results reviewed by legal council.

Trademark infringement can be a problem whenever people attempt to use trademarks or symbols that closely resemble those used by existing companies. Thus, state registration of a national trademark "look alike," does not legitimize using it or offer any protection against claims of the firm that has the trademark registered nationally. One should check the national registration of existing trademarks before using any trademark even on a state or local basis.

Although trademark registration is designed to prevent infringement from others, the entire responsibility of policing their mark against infringement or general use rests upon the trademark holder.

There is a relatively small fee for trademark registration but in many cases the benefits greatly outweigh the cost. One only has to recall widely recognized present day trademarks (APPLE®, MICROSOFT®, HALLMARK®, PRECIOUS MOMENTS®, VICE GRIPS®, etc.), which had little recognition and name value at their inception, to appreciate the potential value of trademarks.

## **Patents**

Patents are different from trademarks in that they give protection on inventions, processes, formulas, or improvements in one of these. Patent protection is a right granted by the government that gives its holder the right to exclude others from making, using, or selling the invention "claimed" in the patent deed, provided that certain fees are paid. The intent of patents is to give the developer of a new product time to recover research and development costs, along with start-up costs, without the influence from competition. Some patents are granted for a period of 17 years. These include utility patents which cover inventions that function in a unique manner, and plant patents which cover asexually reproducible plants. Design patents which cover a unique shape or design of an invention are granted for a period of 14 years.

Patents may not be obtained for an invention that has been publicly disclosed, is in use, or marketed in this country for more than one year before a patent application is filed. Thus, it is critical to patent an invention before disclosing or marketing it, otherwise the possibility of obtaining a patent is jeopardized. Also, patents cannot be obtained on a mere idea or suggestion.

Obtaining a patent can be very time consuming. In fact, the process, which includes conducting a search and the application preparation, may take up to a year and another two years for approval by the U. S. Patent and Trademark office. Patent searches are necessary since these will give the inventor a good indication as to whether the idea has already been patented. The fact that the idea is not on the market doesn't mean that it has not been patented. Thus, the need for a search.

Patent searches can be done several ways. The inventor can consult a patent attorney for a legal search. These usually cost several hundred dollars but provide the best results. The inventor can also visit the UNL Engineering Library and ask for guidance in conducting their own search. There is no cost for this assistance, but it will take time and some computer expertise on the part of the inventor. The UNL Nebraska Technical Assistance Center can provide some information and guidance on patents and trademarks. The center offers no legal advice but provides clients with a list of patent attorneys and agents registered with the U.S. Patent and Trademark Office.

The 1994 cost of obtaining a utility patent includes a \$710 filing fee and an issue fee of \$1,170. These amounts are reduced by 50 percent when the applicant is a small entity or small business concern. In most cases, a large amount of legal assistance is required which increases the costs significantly. Also, costs do not stop once a patent is issued. To keep the patent in force, maintenance fees are required after 3.5 years (\$465), 7.5 years (\$935), and 11.5 years (\$1,410).

A service provided for inventors by the U.S. Patent and Trademark Office is the acceptance and preservation for a limited time of "Disclosure Documents" such as evidence of the dates of conception of inventions. This document, which consists of a written disclosure and a drawing describing the invention, is retained by the Patent and Trademark Office for two years and is then destroyed unless it is referred to in a separate letter in a related patent application filed within two years. During this two-year period, the inventor is urged to apply for a patent.

This program does not diminish the value of the conventional witnessed and notarized records as evidence of conception of an invention; however, it should provide a more credible form of evidence than provided by the practice of mailing a disclosure to oneself or another person by registered mail. There is a \$10 fee for the document disclosure service.

## **Copyrights**

A copyright is a form of protection to the authors of original works including literary, dramatic, musical,

artistic and certain other intellectual works. Examples of copyrightable works include music, motion pictures, books, photographs and architectural works. Copyright laws give the owner of the copyright the exclusive right to reproduce, and to authorize others to reproduce, the copyrighted work, to prepare derivative works based on the original, to distribute copies of the work, and to perform or display the work publicly.

Copyright protection begins as soon as the work is created in fixed form. It is incident of the process, and becomes the property of the author as it is created. Only the author or those deriving their rights through the author can rightfully claim copyright. The employer and not the employee is considered the author in the case of works made for hire, or if the works were created within the scope of his or her employment.

Publication or registration in the copyright office is not required for copyright protection. Copyright is automatically secured as it is created and is fixed in a copy or recorded for the first time. Registration with the [U.S. Library of Congress](#) does however have certain advantages. Registration establishes a public record of the copyright claim, and in the event that the work is infringed on, the court will not allow a defendant to claim "innocent infringement," meaning that he or she was not aware that the work is protected. Innocent infringement claims often reduce the amount of damages that the copyright owner would otherwise receive. Another advantage to copyright registration is that it allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies. Before an infringement suit may be filed in court, copyright registration is necessary, and if made before publication, establishes solid evidence as to the validity of the copyright.

A work that is fixed in a tangible form is protected from the point of creation and normally endures for the author's life, plus an additional 50 years after the author's death. For works classified as "made for hire," the protection lasts for a period of 75 years. As with patents and trademarks, the burden of policing copyrighted materials falls upon the holder of the protected material, or his or her agents.

Trademarks, patents, and copyrights, can play an important role in a small business enterprise. The process of obtaining them can be confusing if not difficult, quite time consuming, and will usually require legal advice. Knowing where to go for information, advice, and assistance makes the process much easier.

## **For More Information on Intellectual Property**

### **U.S. Patent & Trademark Office**

General Information: 800/786-9199

### **Copyright Office, Library of Congress**

General Questions: 202/707-5959

Registration Forms: 202/707-3000

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